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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Implementation of Sections of
the Cable Television Consumer
Protection and Competition Act
of 1992
Rate Regulation

MM Docket No. 92-266

To: The Commission

PETITION FOR RECONSIDERATION

1. Video Jukebox Network, Inc. (VJN) requests that the Commission partially reconsider its action adopting cable television rate regulation procedures.¹ Therein the Commission adopted a benchmark method of cable rate regulation, relying on a price per channel matrix to determine the Maximum Initial Permitted Rates for the regulated programming tiers of a cable television system. As demonstrated below, the formula used to calculate the benchmark rate has the unintended effect of discriminating against cable television programming services that are not distributed by satellite. Accordingly, the Commission should revise its methodology for calculating benchmark rates to eliminate discrimination among program delivery technologies.

¹Report and Order and Further Notice of Proposed Rule Making,
FCC 93-177, released May 3, 1993 ("Rate Regulation Order").

**I. VJN, a Leader in Providing Interactive TV, is a Party Aggrieved
by Adoption of the Rate Regulation Order**

2. VJN is a programming supplier providing music video programming to approximately fourteen million persons, nationwide, over the facilities of 55 cable television systems, 41 low power television stations and one full power television station. It employs a patented viewer-interactive television technology to permit viewers to select music videos for transmission by dialing a 900 telephone number. VJN's programming is distributed to cable systems on video disks and is transmitted to cable subscribers from origination equipment located at the cable headend. In addition, the origination equipment is interconnected into the public switched telephone network to allow for the interactive participation by viewers. VJN competes for audience, advertising revenues and access to cable systems with such satellite-delivered music video services as MTV and VH-1. VJN does not distribute its programming via satellite and is adversely affected by the Commission's use of satellite delivery as a factor in calculating cable rates.

**II. The FCC Reliance on the Number of Satellite Channels
Discriminates Against Programming That Is
Distributed By Alternative Technologies.**

3. The FCC, pursuant to the Congressional mandate of the Cable Act of 1992, sought to establish a simplified form of cable rate regulation designed to reduce the administrative burdens on

subscribers, cable operators, franchise authorities and the FCC.² The Notice of Proposed Rule Making³ considered two alternate rate making methodologies; a benchmark approach and a cost of service approach. In conjunction with the Notice, the FCC surveyed ("Survey") certain selected cable operators to provide subscriber rates and other information for their cable community units and the cable system.⁴ Based on the Survey results, the FCC found that 60 percent of the variation in per-channel rates can be accounted by three variables. It further stated:

satellite delivered signals as one of the rate making variables is discrimination among delivery technologies by making satellite-delivered signals more valuable, i.e., a cable operator can include a satellite-delivered signal in its benchmark evaluation, but not a non-satellite-delivered channel.

5. The fact that VJN's music video programming originates at cable television headends excludes VJN's music video format from consideration in setting a cable system's benchmark rate. This provides cable systems with an economic incentive to purchase music video programming from sources that will increase their benchmark rate, i.e. from VJN's competitors employing satellite delivery, MTV and VH-1.

6. The harm caused by the Commission's introduction of program delivery technology considerations into cable systems' programming decisions is not hypothetical. As explained in the attached statement of Peter Flint, VJN programming was dropped from one cable system because it was not satellite delivered. Additionally, VJN's attempts to place its programming on another large MSO's system were recently rebuffed because the MSO would only launch cable programming designated as "satellite delivered signals."

7. The Request for Emergency Relief by Atlanta Interfaith Broadcasters, Inc. ("AIB") filed in this proceeding on June 8, 1993 provides another concrete demonstration of the economic advantage the Commission's benchmark rate calculations award satellite delivered programming. AIB distributes religious programming over

cable television systems in the Atlanta area via microwave technology. Its principal cable operator has advised AIB that "under the benchmark rate formula it would be allowed \$385,000 more in annual revenue if it arbitrarily replaced AIB with any satellite channel."

8. Accordingly, VJN submits that the Commission's decision to base cable benchmark rates on satellite delivery of programs effectively penalizes any cable operator that decides to place a non-satellite channel on a regulated programming tier.

III. Reliance on Satellite Delivery of Programming in Setting Rates is Arbitrary and Void of any Factual Basis.

9. As noted above, the Benchmark Formula confers a real economic advantage to satellite delivered programming. However, there is no conclusive evidence either in the Survey or the Rule Making to support the underlying proposition that alternate programming distribution technologies affect per-channel rates.

10. In part, the FCC recognized this issue by including within its definition of a "satellite delivered signal" the statement that:

If a cable system picks up a satellite channel via microwave or fiber optic feed, the channel remains a satellite channel if it is available by satellite unless it would be picked up directly over-the-air in the cable

community.⁷

However, this recognition of alternate microwave or fiber optic delivery does not go far enough, because it still requires that the programming to be also available by satellite.

11. Simply stated, there is no rational basis for the Commission's satellite-delivery preference in rate regulation. The benchmark rate calculations should be free of any bias with regard to delivery systems, whether satellite, microwave, fiber optic or, in VJN's case, locally originated.

IV. The Benchmark Rate Formula Will Stifle

Non-Satellite Distribution Technology.

12. The gratuitous economic advantage the cable rate regulation methodology awards satellite-delivered programming adversely affects technology development, as well as viewer programming choices. Viewer-interactive programming technologies and other program distribution technologies that do not employ satellite transmission to deliver signals to a cable headend do not count in setting cable rate benchmarks. Therefore, the FCC has created a disincentive to develop or use non-satellite technologies. Accordingly, demand for new non-satellite program distribution technologies will be dramatically reduced, potentially adversely affecting fiber optic development and interactive development.

⁷ FCC Form 393, Instructions for Worksheet 1, Line 121.

**V. The Benchmark Rate Formula Was Adopted
Without Adequate Notice.**

13. VJN submits that the Commission adopted its cable benchmark rate formula without the notice required by 5 U.S.C. § 553(b).⁸ Specifically, nothing in the Notice initiating this proceeding apprised interested persons that cable television rates might be regulated on the basis of methods of delivering programs to cable headends. Moreover, nothing in the rate regulation provisions of Section 623 of the Communications Act of 1934, as amended, 47 U.S.C. § 543, remotely suggests that cable rates would be tied to satellite delivery of cable programming. Under these circumstances, the Commission erred in adopting a benchmark rate formula based on the number of satellite channels.

**VI. The Benchmark Rate Formula Is An Unconstitutional Burden On
The Free Speech of Cable Operators.**

14. VJN submits that the Commission's decision to base cable benchmark rates on satellite delivery of programs effectively penalizes any cable operator that decides to place a non-satellite channel on a regulated programming tier. As demonstrated by AIB, the penalty for choosing a non-satellite-delivered form of speech

⁸ 5 U.S.C. § 553(b) provides, in pertinent part:

General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

* * * * *

(1) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

can be hundreds of thousands of dollars per year. Such a penalty is, in VJN's view, an unconstitutional government intrusion on a cable operator's First Amendment right to free speech. Cf. Quincy Cable TV, Inc. v. FCC, 768 F. 2d 1434 (DC Cir. 1985).


VII. Proposed Clarification.

15. The solution to the inequities in the Commission's benchmark rate calculations is equal treatment of all programming services, regardless of delivery technology. Focusing rate regulation on satellite delivery of programs harms programmers using other methods of delivering programs to cable headends and penalizes cable operators choosing programs that are not transmitted via satellite. The Commission's rate regulation methodology works this mischief without providing any corresponding benefit to consumers.

16. Accordingly, the "satellite delivery" component of the benchmark cable rate calculation should be replaced with a "cable programming service" component. All video programming distributed over a cable system that is not offered on a per-channel or per program basis should count equally to establish the benchmark rate. This will allow program suppliers to compete for carriage on cable television systems without regard to factors wholly extraneous to per channel rates.

17. In view of the foregoing, VJN requests grant of this petition for reconsideration.

Respectfully submitted,

for 
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of the **BOX**

DECLARATION OF PETER FLINT

My name is Peter Flint. I am Vice President, Affiliate Sales and Marketing for Video Jukebox Network, Inc. (VJN). VJN offers a locally originated, interactive music video programming service to cable systems.

I have reviewed the proposed FCC Form 393 that is to be used by cable operators to calculate their rates. Part of this process includes the calculation of the benchmark per channel rate. A significant factor in determining the benchmark is the number of "satellite-delivered signals" carried on regulated program tiers. Here lies the problem. The FCC has handcuffed the cable operator with regard to their programming flexibility. The term "satellite-delivered signals" has an exclusionary impact if interpreted in the strictest sense. Therefore, any programming service with a method of delivery other than satellite (i.e., microwave, land-line, headend based technology) cannot be utilized to calculate the benchmark per channel rate. This creates a significant obstacle for cable networks not delivered by satellite to gain cable carriage. Cable operators will be financially penalized for offering these networks on regulated tiers.

As Vice President, Affiliate Sales and Marketing for VJN, I am responsible for increasing the cable distribution for VJN's programming service, THE BOX. My staff and I negotiate with cable operators throughout the country in order to gain carriage on their systems. In my twelve years of experience, I have never faced a situation where the decision to launch a cable network is based primarily on federal regulation, rather than programming and financial considerations. The FCC's actions have already caused harm to THE BOX with both existing and future cable affiliates.

On June 2, 1993, a southern California cable affiliate dropped THE BOX from its channel line-up in order to make room for a broadcast station declaring must-carry. Had THE BOX been designated a "satellite-delivered signal", we would not have been placed in this situation. Furthermore, it is likely that as more broadcast stations become eligible for must-carry, or are successful in negotiating retransmission consent, THE BOX will be one of the first cable networks considered expendable.

From a non-affiliate point of view, my department has been told by a number of high-ranking cable executives that the likelihood of launching THE BOX is small if we are not designated a "satellite-delivered signal". For example, one of the largest MSO's in the country had considered launching THE BOX in a mid-atlantic system because of the revenue potential, and the interactive element of THE BOX's programming. On June 14, 1993, I was told that only cable networks designated as "satellite-delivered signals" will be launched in the future.

Declaration of Peter Flint
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Prior to enactment of the FCC's cable rate regulation benchmark formula, VJN was able to compete successfully for inclusion in the basic tier of cable television systems. Programming delivery technology was not a consideration in these negotiations. Delivery technology is now fast becoming the significant factor in determining whether a cable system will use VJN's programming. Delivery technology is not a consideration in consumer satisfaction with programming. It is a wholly extraneous factor introduced solely by the FCC's new rate regulation scheme.

I declare under penalty of perjury that the facts stated above are true.



Peter A. Flint

6/17/93

Date